

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2008 Session

John Broadbent Cundiff v. Callie Ginn Cundiff

Appeal from the Circuit Court for Davidson County
No. 03D-70 Muriel Robinson, Judge

No. M2007-01538-COA-R3-CV - Filed February 23, 2009

Father appeals order allowing relocation of child after Mother secured new employment in Hopkinsville, Kentucky, alleging that the trial court erroneously applied Tenn. Code Ann. § 36-3-108. Finding no error, we affirm the judgment of the trial court.

TENN R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S., and ANDY D. BENNETT, J., joined.

Cynthia M. Odle and Ashlie M. Weeks, Nashville, Tennessee, for the appellee, Callie Ginn Cundiff.

Gregory Dye Smith and Rebecca Kathryn McKelvey, Nashville, Tennessee, for the appellant, John Broadbent Cundiff.

OPINION

The parties were divorced in Davidson County in August 2003; they continued to reside in Davidson County until the time of the proceedings at issue in this appeal. An Agreed Parenting Plan relative to the child born of the marriage was adopted into the Divorce Decree. Of particular relevance to this case, the Final Decree stated:

2.2 SCHOOL SCHEDULE.

The parties have agreed that [the child] should spend equal time with each parent. It is agreed by both parties that neither party will attempt to relocate [the child] from the Nashville area without permission from the other party. Accordingly, [the child] shall reside with her mother from 6:00 p.m. the first Sunday after the entry of this agreement for a period of one week, until 6:00 p.m. on the second Sunday. [The child] shall then reside with her father from 6:00 p.m. Sunday for a period of one week until 6:00 p.m. Sunday. The

parties shall continue to alternate primary parenting responsibilities for [the child] in one week blocks of time.

* * *

Either party may petition the court to change the parenting arrangement set forth above without showing a substantial and material change of circumstances.

2.10 DESIGNATION OF CUSTODIAN.

The child named in this parenting plan, [the child], is scheduled to reside equal time with each parent. However, because it is required to do so, [x] Ms. Cundiff is designated the custodian of [the child] solely for purposes of all other state and federal statutes which require a designation or determination of custody. This designation shall not affect either parent's rights and responsibilities under this parenting plan. Provided, however, that neither party shall have the right to permanently relocate [the child] from Davidson County, Tennessee, to any other location without the express written consent of the other party.

In January 2007, Mother was offered employment in Hopkinsville, Kentucky, and requested that Father consent to the relocation. When Father did not agree, Mother sent Father notice of her intent to relocate in accordance with Tenn. Code Ann. § 36-6-108(a). She subsequently filed a petition to modify the parenting arrangement and to increase child support. Father filed a petition opposing the relocation. Due to a substantial and material change in circumstances, Father also petitioned the court to modify the parenting arrangement by designating him as primary residential parent and adjusting parenting time accordingly.

Following a hearing, the court entered its order permitting the relocation; designating Mother as primary residential parent for the child's school year; and designating Father as primary residential parent from June 1 until the two days before the school year starts.

Standard of Review

This case was tried by the court sitting without a jury; consequently, our scope of review of the court's factual findings is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998). If the trial court made no specific findings of fact, then we must look to the record to "determine where the preponderance of the evidence lies." *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002). Review of questions of law is *de novo* with no presumption of correctness. *See State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997).

Discussion

Tenn. Code Ann. § 36-6-108 sets forth the procedure to be followed by the parties and the court when a parent decides to relocate, thereby necessitating changes in an existing parenting plan. Under § 36-6-108(a) a relocating parent must give notice of intent to relocate to the other parent and, if the parents cannot agree on a new visitation schedule, the relocating parent must file a petition seeking to alter visitation. *Id.* § (b). In considering a potential change in custody or other visitation arrangements brought about as a result of the relocation, the court is required to consider “all relevant factors” as well as those specified at § 36-6-108(d). *Id.*

If the non-relocating party objects to the proposed relocation, that party may file a petition in opposition to the removal pursuant to § 36-6-108(c) or (d), depending upon the amount of time spent with the child. When such a petition is filed, the court must make an initial determination as to whether the parents are spending substantially equal intervals of time with the child. If so, the court proceeds under § 36-6-108(c) to determine whether to permit relocation “based upon the best interest of the child.”¹ If the parents are not spending substantially the same time with the child and the parent seeking to relocate is the parent who spends the greater amount of time with the child, relocation is permitted unless the court makes certain findings, specified at § 36-6-108(d). *See Roberts v. Roberts*, 2005 WL 2860199 at *3 (Tenn. Ct. App. Oct. 31, 2005); *Collins v. Coode*, 2004 WL 904097 at *2 (Tenn. Ct. App. April 27, 2004).

The parenting plan incorporated into the Final Decree in this case provided that the child would spend equal time with each parent. Following the hearing giving rise to this appeal, the trial court found that Mother and Father “have exercised their parenting time within the week-to-week schedule up until the trial of this case.”² The court then conducted its determination of whether to approve the proposed relocation in accordance with Tenn. Code Ann. § 36-6-108(c). The court conducted an analysis of the factors set forth in the statute and found that the factors were neutral.³ The court made the following finding with regard to the child’s best interest:

In determining the best interest of the child, the Court finds from the testimony of the minor child that she is a bright, articulate seven year old. The minor child wants to be primarily in the care of her mother if her mother locates to Hopkinsville, Kentucky. The Court finds that this is not unusual for a seven-year-old girl and not a bad reflection on the father, or any indication that she does not love her father.

¹ Tenn. Code Ann. § 36-6-108(c) specifies eleven factors to be considered in determining the best interest of the child in addition to other factors the court deems relevant.

² Neither party assigns error to this finding.

³ Father does not challenge the court’s findings in that regard, other than the court’s reliance on the child’s testimony in concluding that relocation was in the child’s best interest.

Father contends that the court erred in three respects: (1) in determining that it was not necessary for the court to determine whether Mother's proposed relocation had a "reasonable purpose" in accordance with Tenn. Code Ann. § 36-6-108(d); (2) in determining that the proposed relocation had a reasonable purpose;⁴ and (3) basing its determination that relocation was in the best interest of the child on an erroneous understanding of the child's testimony.

A. Reasonable Purpose Determination

Father contends that the language of Tenn. Code Ann. § 36-6-108(b) stating that the court "shall consider all relevant factors, including those factors enumerated within subsection (d)" means that a "reasonable purpose" analysis should have been conducted by the court. We respectfully disagree.

Tenn. Code Ann. § 36-6-108(b) requires the court to make appropriate modifications to existing custody arrangements where there is no objection to a parent's relocation but the parents do not agree on visitation and support. In considering a potential change in custody, visitation and other arrangements, the statute directs that the court consider "all relevant factors," specifically including those identified in § 36-6-108(d); it does not direct the court to determine whether or not to allow the child's relocation. Thus, the "reasonable purpose" inquiry under § 36-6-108(b) is made in the context of determining what modifications to the existing parenting arrangement are necessary in light of the relocation rather than in determining whether to approve relocation of the child. Inasmuch as the matter pending before the court in this case was a determination of whether the relocation of the child would be allowed, the provisions of Tenn. Code Ann. § 36-6-108(b) were not at issue and the trial court correctly conducted its inquiry into Mother's proposed relocation in accordance with Tenn. Code Ann. § 36-6-108(c).

In light of our holding that the court was not required to make a "reasonable purpose" determination, it is not necessary for us to determine whether the trial court correctly held that there was a reasonable purpose in Mother's relocation.

B. Best Interest Determination

Father contends that the trial court erred in basing its determination that relocation was in the best interest of the child on an erroneous understanding of the child's testimony. Father cites the following testimony in this regard:

Q. [by counsel]: Do you want to live in Kentucky?

⁴ The court made a separate finding as follows:

The Court further finds that because these parents share "substantially equal" time with the minor child, "the relocation does not have a reasonable purpose defense" is not applicable in this case. If such a defense were available, however, the Court would find that the proof shows that the relocation does in fact have a reasonable purpose.

A. [the child]: Yes

Q. [by the court]: If your mother lives there?

Q. [by counsel]: If your mother lives there?

A. Yes

Q. [by the court]: And what if you mother didn't want to live there? Would you want to live there?

A. Not really.

* * *

THE COURT: Do you think you'd be happy if you stayed here?

A. Yeah, just wherever my mom - -

THE COURT: Wherever your mom is?

A. - - and my dad - -

THE COURT: Mom and dad?

A. - - get along.

We have reviewed the entire testimony of the child and do not agree that the quoted testimony is the only testimony of the child relating to her potential move to Kentucky. We note particularly the following:

Q. Now, do you have friends in Kentucky?

A. Yeah. I have lots of friends. I mean, our whole family in is Kentucky. That's why I want to move there - - but yes, I do.

Q. Would you see - - do you see more of your dad's family when you're in Kentucky or when you're in Tennessee?

A. Kentucky.

Q. Now, you've got dad's family - - some of dad's family here in Tennessee?

A. Yeah.

Q. And do you see them very often when you're here in Tennessee?

A. No.

The question before this court is whether the preponderance of the evidence is to the contrary of the court's finding that relocation to Kentucky was in the best interest of the child. We afford the findings of the trial judge great weight since she saw and heard the witnesses and observed their manner and demeanor on the stand; the trial court was in a much better position than are we to judge the weight and value of the testimony at trial. *See Duncan v. Duncan*, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984).

The court found the child to be a most credible witness and clearly gave her testimony significant weight. In addition to the child, there was other testimony upon which the trial court could have reasonably relied in making its best interest determination, including testimony relative to Mother's imminent remarriage, Father's living arrangements and the availability of relatives on

both sides of the child's family in Kentucky. We are unable to say that the evidence preponderates against the trial court's finding that relocation was in the best interest of the child.⁵

Conclusion

For the reasons set forth above, we affirm the judgment of the Circuit Court. Costs are assessed against Appellant.

RICHARD H. DINKINS, JUDGE

⁵ We also note the following finding of the trial court:

The Court further finds that the move to the Hopkinsville, Kentucky area is not adverse to this minor child's best interest. There is absolutely no evidence the move would be substantially harmful to the child or interfere with her relationship with her father or her mother.

While this finding does not equate with a finding that relocation was in the child's best interest, it does give some indication of the careful consideration given by the trial court to its determination.